No. 708

Supreme Court of the United States

IB CHR. SONNESEN,
Petitioner,

against

PANAMA TRANSPORT COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE NEW YORK COURT OF APPEALS.

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STATEMENT.

Petitioner seeks a Writ of Certiorari to the Court of Appeals of the State of New York from a judgment of that court which did not finally dispose of the case but ordered a new trial of the issues between the parties. Petitioner had obtained a verdict in the trial court which was reversed and the complaint dismissed by the Appellate Division, Second Department of the New York Supreme Court (272 App. Div. 948; Transcript of Record, page 306, fol. 311). On appeal to the New York Court of Appeals a new trial was ordered (298 N. Y. 262; Transcript of Record, page 311, fol. 319).

POINT I.

THE UNITED STATES SUPREME COURT IS WITHOUT JURISDICTION TO GRANT A WRIT OF CERTIORARI TO A COURT OF ONE OF THE SEVERAL STATES WHERE THE JUDGMENT IS NOT FINAL.

The question of the lack of finality of the judgment below is simple. There are no complexities or court rules by which the judgment could be misconstrued as a final judgment. At the present time, the parties are in approximately the same position that they were in prior to the time that the trial below was had.

The statute upon which this petition is based (see page 2 of petitioner's brief) is Title 28 U. S. C. 1257, subdivision 3. That section reads in part as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
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> • • • • • •
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> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

This statute has been construed innumerable times and there has never been any doubt that a judgment directing a new trial is not final. A few of the cases are mentioned. *Gospel Army* v. *Los Angeles, et al.*, 331 U. S. 543; *Market Street Railway Company* v. *Railroad Commissioner of the State of California*, 324 U. S. 548.

In the *Gospel Army* case, the court said at page 546:

> "Under §237 of the Judicial Code U. S. C. Section 344 [now Section 1257] only 'final judgments' of state courts may be appealed to this Court. And it frequently has been said that for a judgment of an appellate court to be final and reviewable for this purpose it must end the litigation by fully determining the rights of the parties, so that nothing remains to be done by the trial court 'except the ministerial act of entering the judgment which the appellate court * * * directed.' *Department of Banking* v. *Pink*, 317 U. S. 264, 267. Thus, where the effect of the state court's direction is to grant a new trial, the judgment will not be final."

The quality of the finality of a judgment authorizing jurisdiction of the Supreme Court was defined in the *Market Street Railway* case, at page 551, as follows:

> "Our jurisdiction to review a state court judgment is confined by long-standing statute to one which is final. Judicial Code, §237, 28 U. S. C. §344. Final it must be in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court."

The petition does not assert that the judgment below was final. Apparently, the petition overlooks the need for finality of the judgment before the jurisdiction of this court may attach.

The remittitur in the case at bar (Transcript of Record p. 309, fol. 317) states:

> "Therefore, it is considered that the said judgments be reversed and a new trial granted with costs to the appellant to abide the event, as aforesaid."

The judgment in the case at bar fails in finality in the two respects declared necessary in the *Market Street* case (*supra*). The judgment is subject to further action by another state tribunal which is not a final court and there has not been an effective determination of the litigation.

In view of the defect in the jurisdiction, it is thought unnecessary to deal with statements as to the facts and law contained in the petition. The fact statements vary considerably from the record. Much of the argument made is based on these unsupported and untrue allegations as to the facts. The misstatements are so numerous that it would require many pages to answer them all and in the circumstances it is thought not only unnecessary to do so but that such rebuttal would put an unnecessary burden on the court.

A reading of the opinions of the Appellate Division and the Court of Appeals demonstrates that no such questions as are conjured by the petition exist in the record or even lurk in it.

CONCLUSION.

IT IS RESPECTFULLY SUBMITTED THAT THE PETITION FOR A WRIT OF CERTIORARI BE DENIED FOR LACK OF JURISDICTION BECAUSE OF THE NON-FINAL CHARACTER OF THE JUDGMENT OF THE NEW YORK STATE COURT OF APPEALS.

Respectfully submitted,

WALTER X. CONNOR,
VERNON SIMS JONES,
Attorneys for Respondent.